SUPREME COURT, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

HERBERT L. FISCHER, et al.
Petitioners,

v.

THE PHILADELPHIA ELECTRIC COMPANY, et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under ERISA, when does a plan administrator/fiduciary who is also the employer have a fiduciary duty to truthfully tell plan participants that a change to the pension plan is under consideration?

PARTIES TO THE PROCEEDING

The Petitioners are the class members who consist of former employees of PECo who retired January 1, 1990, February 1, 1990, March 1, 1990 or April 1, 1990, who would have reached age 50 on or before December 31, 1990 and who would have completed five or more years of credited service under the company's pension plan as of December 31, 1990 had they still been employed by PECo at that time. [Appendix at 39a]. This class includes the following named plaintiffs: Herbert L. Fischer, Floyd L. Adams, James W. Alfreds, John I. Arena, Earl T. Atkinson, William Auve, Thomas F. Beck, William J. Bono, William A. Burwell, Jr., Joseph C. Calabrese, Peter Carfagno, John B. Creighton, Ralph J. DaFermo, Sr., Felix A. DeJoseph, Joseph A. DeVito, John T. Dougherty, John J. Dowling, Anthony Falasca, Eugene Fink, Rita J. Gesualdo, Joseph L. Giorgio, Edwin Haines, Joseph T. Haley, Daniel J. Hefferan, Leo M. Hill, Robert J. Hoopes, Donald J. Hoy, Michael Hrynko, Donald Hughes, Carl M. Hunsicker, Neal Ireland, Walter D. Kraus, Charles E. Lindemuth, Robert F. Mahoney, Anthony D. Marchesani, Robert P.F. McCarron, Robert McCormick, Frank L. Mercadante, John P. Monaghan, David Monzo, John K. Moore, Joseph P. Moran, Mildred Pearl Morgan, Ralph E. Moyer, Herbert E. Mueller, James J. Nugent, Thomas E. Oetzel, Frank J. Roddy, John J. Saunders, Louis F. Saunders, Nicholas J. Screnci, Joseph J. Semetti, John Steindl, William F. Thompson, Michael W. Trendler, Francis R. Tunney, Sr., Herbert R. Walters, Richard S. Wilson, John H. Zimmer and Gerald A. Zimmerman.

The Respondents are Philadelphia Electric Company, Joseph F. Paquette, Jr., Michael J. Crommie and Service Annuity Plan of Philadelphia Electric Company.

RULE 29.6 STATEMENT

There are no affiliates or subsidiaries of Philadelphia Electric Company other than wholly-owned subsidiaries to petitioners' knowledge.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Herbert L. Fischer, et al., through their undersigned counsel, petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The most recent opinion of the Court of Appeals in this case is reported at 96 F.3d 1533 (3d Cir. 1996) [Appendix at 1a-24a]. The most recent opinions of the District Court in this case (Appendix at 25a-55a) are not reported.[1] The denial of a Writ of Certiorari by the United States Supreme Court in this case is reported at 510 U.S. 1020, 114 S. Ct. 622 (1993) [Appendix at 56a]. The first opinion of the Court of Appeals is reported at 994 F.2d 130 (3d Cir. 1993) [Appendix at 57a-68a]. The previous opinion of the District Court in this case (Appendix at 77a-119a) is not reported. The Third Circuit Court of Appeals' opinion denying a petition for rehearing following the first decision by the Court (Appendix at 120a-121a) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of ERISA are 29 U.S.C. §1104(a) and §1132(a) and (e). They are reproduced in the Appendix. [Appendix at 122a-123a].

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[1] In the District Court, the Fischer case was consolidated with the case of Kurz v. Philadelphia Electric Co., because the legal issues involved were virtually identical. The Court of Appeals also reversed the decision in favor of the Kurz class members based in part upon the same legal issues presented in this Petition for Writ of Certiorari. Three class members in the Kurz case have requested a rehearing (based upon a statute of limitations argument) which has not yet been ruled upon by the Third Circuit. The class members intend to file a Petition for Writ of Certiorari in the Kurz case once the petition for rehearing has been decided.

STATEMENT OF THE CASE

This petition involves the claim that PECo violated a fiduciary duty under ERISA owed to former employees who participated in the company's pension plan prior to their retirement. The petitioners alleged and, with respect to some of the class members' claims, the District Court agreed, that PECo misled them about its "serious consideration" of a possible amendment to the pension plan which would have increased their retirement benefits. The Third Circuit Court of Appeals reversed the decision of the District Court finding that PECo was not seriously considering a change to the pension plan under a new three-prong test which the court imposed. The specific issue presented in this petition is when under ERISA does a fiduciary duty arise on the part of a plan administrator who is also an employer to truthfully tell plan participants that it is considering a possible change to the pension plan.

A. Factual Background

On April 19, 1990, Joseph Paquette, the President, Chief Executive Officer and Chairman of the Board of PECo announced a decision to recommend that the Board of Directors amend PECo's Service Annuity Plan to implement an early retirement incentive program. This lucrative program, enacted on May 25, 1990, provides a lifetime of enhanced pension benefits for employees who elected this option. Had petitioners still been employed by PECo when this program came into effect, they would have been eligible to participate in the plan. Unfortunately, they retired before this announcement because they were led to believe that PECo was not considering plans to offer a retirement incentive program in the near future.

That is, PECo had a standard procedure for processing retirement applications which required the Department of Human Resources to conduct a retirement interview with the potential retiree in order to provide information about benefits. During late 1989 and early 1990, the majority of these retirement interviews were conducted by John McCartney, the Senior Benefits Counselor. Mr. McCartney candidly testified during his

deposition that most of the employees who were going to retire from January to April, 1990 questioned whether there were going to be any changes to the pension plan. Rumors to this effect had been circulating throughout the company, thereby prompting the employees' questions which in turn caused Mr. McCartney to ask his supervisor, Michael Crommie, the Director of the Benefits Division of the Human Resources Department, on two or three occasions if he was aware of any changes to the pension plan being contemplated. Mr. McCartney knew that prospective retirees were asking whether there were plans to change the pension so they could defer their retirement in order to take advantage of any amendments to the pension plan and, therefore, he saw it as his responsibility to give as accurate and as complete as possible an answer to their questions. Mr. Crommie admits that during 1989 his staff advised him that they were getting an increasing number of questions from employees about a retirement incentive. He also admits that he and his staff:

> "went over and made sure that our answers were consistent in that we had no knowledge of any plan - an early retirement plan that was being generated, studied, implemented, so that was the consistent answer that we and I (Mr. Crommie) instructed the staff to give to that question of whether or not there was a sweetener in the wind, whether the company was working on a sweetener." [Crommie Deposition, p. 84].

Unfortunately, Mr. Crommie did not see it as part of his responsibility, in order to assure that his answers were complete, truthful and accurate, to obtain information from other sources; his reasoning -- "if management wanted me to know anything, they would have instructed me so." [Crommie Deposition, pp. 85-86]. Thus, he directed his subordinates in the Benefits

an early retirement package. Plaintiffs' Answers to Defendants' Interrogatories documenting this point were relied upon by the Court of Appeals in Fischer I as providing sufficient evidence of misrepresentation to preclude summary judgment in favor of PECo.

Contrary to the representations made by respondents, petitioners offered substantial proof that plans to offer an early retirement program as a means of reducing the bloated PECo work force had been initiated two years earlier. In March, 1988, management personnel in the Employees Services Division of PECo recommended amending the PECo Service Annuity Plan to offer an early retirement sweetener as a means of achieving a reduction in the work force. From March through June, 1988, Towers, Perrin, Forster & Crosby (hereinafter "TPF&C") was consulted by PECo to address certain options for an early retirement program. TPF&C worked closely with senior management personnel at PECo, including defendant, Michael Crommie, in developing various early retirement options and in June, 1988 presented a detailed calculation of costs for open window programs, including a program to be effective January through July 1989, which was remarkably (and curiously) similar to that which is the subject of this lawsuit.

These proposals were being explored in 1988 by senior management in part because of the fear that PECo was headed for bad financial times, including the possibility that the Pennsylvania Public Utility Commission (PUC) would not grant the rate increase PECo was looking for in the future. However, there was an "ongoing concern" that if PECo had a voluntary early retirement "sweetener" and incurred additional costs, the PUC would not allow PECo to recover the additional costs in the rate base. Apparently, this concern resulted in tabling the proposal for a retirement incentive until after the PUC rate increase request was decided.

In July, 1989, PECo filed the request with the PUC for a $549 million rate increase. Given that Mr. Paquette believed that the financial future of PECo hinged on the rate decision, it is not surprising that he immediately implemented plans to reduce costs.

In July, 1989, he discussed with Mr. Friderichs, the Manager of Corporate Planning and Analysis, the need for a strategic plan for the financial future of PECo, and in early August, 1989, requested him to identify outside consultants to assist in such efforts.

When PECo learned in October, 1989 that the PUC staff had recommended that PECo receive less than half the rate increase requested, the urgency to prepare for the eventuality of not getting its full rate increase was heightened. Therefore, in November, 1989, PECo hired McKinsey and Company, a consulting firm, to assist in the development of a new corporate strategy. One of the aspects which McKinsey studied was staff reduction.

This was the current state of affairs at PECo when Mr. Paquette announced in a December, 1989 speech that an early retirement program might be implemented if PECo decided to reduce its work force. Paquette already knew, however, that the work force had to be reduced and, in fact, that had been his long-term goal since he returned to PECo in March, 1988. He also had to have known that the chances of PECo getting its full rate increase were slim given the PUC's recommendation that it receive less than half of what was requested. By December, 1989, Mr. Paquette also knew the following important facts: That by mid-February, 1990, the Administrative Law Judges would submit their recommendation to the PUC as to how much of a rate increase PECo should get; that the PUC's final decision is generally very close to the ALJs' report; and that the PUC's final decision would be rendered by April 20, 1990. In short, Mr. Paquette had to realize by this time that it was only a question of four months time as to <u>when</u>, <u>not if</u>, an early retirement incentive would be recommended.

The efforts to develop an early retirement program escalated in March, 1990, after the Administrative Law Judges issued an interim decision on PECo's rate increase application, recommending that it receive only 21% of the full amount requested. PECo management was well aware that the PUC's final decision is generally very close to the ALJ's report.

Therefore, Kenneth Lefkowitz, the Manager of Compensation and Benefits Division, began outlining options for reducing the work force. On March 12, 1990, he contacted TPF&C to discuss options and, in particular, advised that PECo wanted to consider an early retirement sweetener. In response to his requests, Mr. Murdoch, a Vice President of TPF&C, sent a confidential memorandum to Mr. Lefkowitz on March 28, 1990 outlining three alternative "open window" programs for a proposed staff reduction, the first of which was the same early retirement program which had been initially considered in June, 1988!

In April, 1990, PECo senior management continued their concerted effort, with the help of TPF&C and McKinsey, to meet Mr. Paquette's goal of reducing costs and looked at early retirement incentive options as the method for reducing the work force to achieve that goal. The various studies, meetings, and reports generated during these planning efforts ultimately resulted in the announcement made by Mr. Paquette on April 19, 1990 to recommend a retirement incentive package.

Clearly, affirmative steps were being taken by PECo from at least March 12, 1990, to meet Mr. Paquette's goal of reducing costs and looking at methods of reducing the work force including early retirement options to achieve that goal.[2] It is equally clear that PECo management made a conscious decision not to share that information with the employee population. Mr. Paquette admitted at his deposition that even if Mr. Lefkowitz

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[2] Petitioners submit that plans to change pension benefits were under serious consideration at an even earlier date but at the very least, by March 12, 1990 -- the date on which the District Court determined serious consideration began. If the Court grants certiorari in this case, the Subclass B petitioners (those members who retired before 3/12/90) ask the Court to consider their claim that plans to offer an early retirement incentive were under sufficient consideration to trigger PECo's duty to truthfully inform them of the plans before their retirement.

was considering an early retirement program in March, 1990, he was not authorized to inform employees of that fact. Mr. Lefkowitz acted accordingly and, as he confirmed at his deposition, did not consider letting prospective retirees know in March, 1990, about the possibility that PECo might implement an early retirement program. Indeed, Mr. Lefkowitz intentionally hand wrote his March 28, 1990 "reduction in force" memorandum instead of having it typed in order to maintain confidentiality. The management personnel involved with the McKinsey study were likewise instructed that their activities were to remain confidential. Mr. Friderichs, who was in charge of coordinating the McKinsey study, acknowledged that it had been the common practice at PECo to maintain confidentiality of discussions about possible proposed or contemplated benefit changes.

B. The Proceedings Below

Despite the extensive evidence, as outlined above, the District Court, when initially considering the case, decided that there were no material misrepresentations made to petitioners because PECo had not given "serious consideration" to changing the pension plan until such plans were officially announced. The District Court granted summary judgment in favor of the respondents. The petitioners appealed to the Court of Appeals which relied upon convincing factual evidence to conclude that the District Court's characterization of the record as lacking evidence of material misrepresentations by PECo was incorrect and therefore reversed and remanded the case for trial. In so deciding, the Court rejected PECo's explanation that since the company had never told the benefits counselors that it was considering changes to the pension plan, then the counselors' representations to the respondents, that no such plans were being contemplated, were truthful, holding:

> "This explanation will not do, for the fiduciary obligations owed to the plan participants were owed by PECo as plan administrator. These obligations cannot be circumvented by building a chinese wall around those employees on whom

> plan participants reasonably rely for important information and guidance about retirement." Fischer v. Philadelphia Electric Co., 994 F.2d 130, 135 (3d Cir. 1993) [Fischer I; Appendix at 66a].

The Court of Appeals also gave the District Court the following specific instructions to follow on remand when determining whether the contents of the particular communications PECo made to the petitioners constituted affirmative misrepresentations:

> "The content of the particular communications PECo allegedly made to members of the plaintiff class and whether such communications constituted affirmative misrepresentations are questions of fact properly left to the trier of fact on remand. Whether an affirmative misrepresentation was 'material', however, is a 'mixed question of law and fact.' In the present context, a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. Included within the overall materiality inquiry will be an inquiry into the seriousness with which a particular change to an employee pension plan is being considered at the time the misrepresentation is made. All else equal, the more seriously a plan change is being considered, the more likely a misrepresentation, e.g., that no change is under consideration, will pass the threshold of materiality." Id. [Fischer I; Appendix at 67a] [Citations omitted].

The respondents filed a petition for rehearing and rehearing en banc to the Third Circuit Court of Appeals which was denied. [Appendix at 120a-121a]. Thereafter, the respondents filed a Petition for Writ of Certiorari with this Court which was also denied. [Appendix at 56a].

On remand, the main question which the District Court was required to decide was when PECo began to seriously consider an early retirement incentive plan. The District Court determined that serious consideration began on March 12, 1990 which the Court characterized as "the earliest time when PECo took affirmative action to change the retirement plan," based upon the fact that that was the date when "Ken Lefkowitz, PECo's manager of benefits, contacted Towers & Perrin. Lefkowitz stated the company's concern about its rate case before the PUC and PECo's need to reduce costs quickly. The question of an early retirement sweetener was raised as a possible method at this time." [*Opinion of the District Court, May 16, 1994, Conclusion of Law No. 13, p. 19*, Appendix at 38a-39a]. The Court found that PECo, thereafter, undertook systematic activity to implement an early retirement plan. [*Id, Conclusion of Law No. 14*]. This included the following activity in March 1990:

- On March 20, Mr. Lefkowitz again spoke with Mr. Murdoch of TPF&C and directed him to develop alternatives for a reduction in force program, including an alternative considered in 1988 for an early retirement incentive. He was also to examine voluntary programs and assess legal aspects and costs. [*Opinion of the District Court, May 16, 1994, Finding of Fact No. 128, p. 7*, Appendix at 30a].

- On March 28, 1990, Mr. Murdoch of TPF&C presented his analysis of three alternative open window programs (early retirement incentives) for staff reduction at PECo. The first alternative was very similar to the sweetener discussed in 1988. [*Id, Findings of Fact Nos. 129-130, pp. 7-8*, Appendix at 30a].

- On March 30, 1990, Larry Kanarek of McKinsey & Company sent a letter to Joseph Friderichs of PECo setting out a possible agenda for cost cutting. Included was a discussion of reductions in force through a combination of layoffs, accelerated retirements or

attrition. [Id, *Findings of Fact No. 135, p. 8*, Appendix at 31a].

The District Court then divided the class members into two subclasses: Subclass A consisting of all of those members of the Fischer class who solicited information and retired after PECo's duty to inform retirees of the pending change arose on March 12, 1990; and Subclass B, consisting of all other members of the Fischer class. Id. [*Conclusion of Law No. 23,* Appendix at 40a]. Thereafter, the Court held a separate hearing to determine the petitioners who constituted Subclass A and the damages to which they were entitled. In this damages phase of the trial, the District Court also clarified its prior opinion and held, on the basis of precedent from the Third Circuit, that once PECo began to seriously consider changes to the pension plan, it had a duty to correct information disseminated before that date to the effect that no change was forthcoming and was also under an affirmative duty to now inform even those participants who did not specifically ask about any such changes that the company was seriously considering an amendment to the pension plan. [*Opinion of the District Court, August 22, 1995,* Appendix at 47a-52a]. The Court then entered an order specifically identifying those members of Subclass A and the amount of damages to which they were entitled. [Appendix at 53a].

Both parties then appealed to the Third Circuit Court of Appeals. The petitioners, on behalf of the Subclass B members, argued that the District Court's decision that serious consideration did not begin until March 12, 1990 was clearly erroneous given the extensive history of PECo's planning efforts before that date. The respondents, to the contrary, argued that the District Court clearly erred in finding that serious consideration began as early as March 12, 1990, claiming that senior management with authority to implement such a pension plan change had not considered such a program until later in April 1990.

Despite the factual nature of the decision made by the District Court, the Court of Appeals reversed the decision of the District Court in favor of the Subclass A plaintiffs, finding that

serious consideration of the early retirement incentive did not begin until April 7, 1990. To reach that decision, the Court developed a new definition of serious consideration:

> "... We believe that the following formulation of serious consideration is appropriate: serious consideration of a change in plan benefits exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change." [Fischer v. Philadelphia Electric Co., 96 F.3d 1533, 1539 (3d Cir. 1996) [Fischer II, Appendix at 12a].

The Court determined that these three factors most interact and coalesce to form a composite picture of serious consideration. The Court's further explanation of these factors underscores the restrictiveness of this definition which had the intended result of precluding the Subclass A petitioners, who the District Court after reviewing a substantial amount of evidence had concluded were indeed misled by the affirmative misrepresentations of PECo, from recovering. While lengthy, the Court's explanation bears citation in full here:

> "The first element, a specific proposal, distinguishes serious consideration from the antecedent steps of gathering information, developing strategies, and analyzing options. A company must necessarily go through these preliminary steps before its deliberations can reach the serious stage. This factor does not mean, however, that the proposal must describe the plan in its final form. A specific proposal can contain several alternatives, and the plan as finally implemented may differ somewhat from the proposal. What is required, consistent with the overall test, is a specific proposal that is sufficiently concrete to support consideration by senior management for the purpose of implementation.

The second element, discussion for implementation, further distinguishes serious consideration from the preliminary steps of gathering data and formulating strategy. It also protects the ability of senior management to take a role in the early phases of the process without automatically triggering a duty of disclosure. This factor recognizes that a corporate executive can order an analysis of benefits alternatives or commission a comparative study without seriously considering implementing a change in benefits. Preliminary stages may also require interaction among upper level management, company personnel, and outside consultants. These discussions are properly assigned to the preliminary stages of company deliberations. Consideration becomes serious when the subject turns to the practicalities of implementation.

The final element, consideration by senior management with the authority to implement the change, ensures that the analysis of serious consideration focuses on the proper actors within the corporate hierarchy. As noted, large corporate entities conduct regular or on-going reviews of their benefit packages in their ordinary course of business. These entities employ individuals, including middle and upper-level management employees, to gather information and conduct reviews. The periodic review process may also entail contacting outside consultants or commissioning studies. During the course of their employment, the employees assigned these tasks necessarily discuss their duties and the results of their studies. These discussions may include issues of implementation. The employees may also make recommendations to upper level management or senior executives. As a general rule, such operations will not constitute serious consideration. These activities are merely the

> ordinary duties of the employees. Until senior management addresses the issue, the company has not yet seriously considered a change.
>
> Consideration by senior management is also limited to those executives who possess the authority to implement the proposed change. This focus on authority can be used to identify the proper cadre of senior management, but it should not limit serious consideration to deliberations by a quorum of the Board of Directors, typically the only corporate body that in a literal sense has the power to implement changes in benefits packages. It is sufficient for this factor that the plan be considered by those members of senior management with responsibility for the benefits area of the business, and who ultimately will make recommendations to the Board regarding benefits operations." Id, 96 F.3d at 1539-1540. [Appendix at 12a-13a].

On October 1, 1996, the Court of Appeals entered judgment in favor of the respondents holding that serious consideration did not arise until April 7, 1990. Despite the fact that PECo was admittedly engaged in gathering information from outside consultants concerning the development of an early retirement program before that date, the Court held that those petitioners who were told that no plans were in the works were not misled because PECo had not been seriously considering those plans for implementation until senior management, including Mr. Paquette, the Chief Executive Officer and President, met on April 7 to discuss a specific proposal from TPF&C. The petitioners have filed a timely Petition for Writ of Certiorari to this Honorable Court.

REASONS FOR GRANTING THE WRIT FOR CERTIORARI

It is respectfully submitted that this Honorable Court should grant certiorari in this case for the following compelling reasons: First, the restrictive definition of "serious consideration" imposed by the Third Circuit Court of Appeals establishes an important decision on the interpretation of fiduciary duties imposed by ERISA which has not been settled by the Supreme Court. Because this decision could impact plan participants and companies throughout the country, the Supreme Court, as final arbiter of federal issues arising under ERISA, should finally determine when the fiduciary obligation to inform plan participants of potential changes to a pension plan arises, particularly under circumstances where, as here, the plan fiduciary is aware that participants are asking questions regarding such changes in order to make important decisions as to if and when to retire.

Secondly, the restrictive three prong test of serious consideration imposed by the Court of Appeals permits plan fiduciaries to advise participants that there are no plans for a change to the pension plan at a time when the company is indeed undertaking considerable planning efforts towards such a goal. At the very least, this communication, authorized by the decision of the Court of Appeals, is misleading and as such, is in contravention to the policies established by this Court in the recent case of Varity Corp. v. Howe, ___ U.S. ___, 134 L. Ed.2d, 116 S. Ct. 1065 (1996).

Third, other courts of appeals have held that the question of when a fiduciary has an obligation to inform plan participants of potential changes to the pension plan presents a question of fact as to when such plans are under "serious consideration." These courts have not imposed strict limitations on the definition of "serious consideration" thereby appropriately permitting the trier of fact to consider all of the evidence which may, as in this case, clearly establish that the company was seriously considering a change to the pension plan at a time before a specific proposal was under discussion by senior management having the authority

to implement such plans. See, Mullins v. Pfizer, Inc., 23 F.3d 663 (2d Cir. 1994); Wilson v. Southwestern Bell Telephone Co., 55 F.3d 399 (8th Cir. 1995); Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992); Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154 (6th Cir. 1988). In this respect, the Third Circuit Court of Appeals' decision is in conflict with decisions of the Second, Sixth and Eighth Circuits.

A. This Case Presents an Important Question of Federal Law that has not been Settled by the Supreme Court.

ERISA protects employee pensions by, in part, imposing certain general fiduciary duties applicable to the management of pension benefit plans. See, ERISA §404, 29 U.S.C. §1104 [Appendix at 122a]. Indeed, ERISA requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." ERISA §404(a), 29 U.S.C. §1104(a). Id.

The duties of an ERISA fiduciary are not limited by the statute's expressed provisions, but instead, include the duties derived from common law trust principles. Varity Corp. v. Howe, supra. The fiduciary requirements imposed under ERISA have been delineated as having the following three components: "(a) duty of loyalty pursuant to which all decisions regarding an ERISA plan 'must be made with an eye single to the interest of the participants and beneficiaries.'" Donovan v. Bierwirth, 680 F.2d 263, 273 (2nd Cir. 1982); the "prudent man" fiduciary obligation which, when combined with the duty of loyalty, imposes an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to plan participants and beneficiaries and in so doing to act as a prudent person would act in a similar situation. Morse v. Stanley, 732 F.2d 1139, 1145 (2d Cir. 1984); and finally, an ERISA fiduciary must act "for the exclusive purpose" of providing benefits to plan beneficiaries. Donovan v. Bierwirth, supra at 271.

In judicially defining the scope of these fiduciary duties, the United States Supreme Court has recently confirmed that

intentional misrepresentations are inconsistent with the duty of loyalty owed by all fiduciaries and codified in Section 404(a)(1) of ERISA. Varity Corp. v. Howe, supra, 116 S. Ct. at 1074.

The question which the petitioners ask this Court to review -- when does an ERISA fiduciary have an obligation to truthfully inform plan participants that it is considering a change to the pension plan -- presents an issue of first impression before this Court which many courts of appeals around the country have been asked to address under factual circumstances similar to the instant case. See, Vartanian v. Monsanto Co., 14 F.3d 697 (1st Cir. 1994); Mullins v. Pfizer, Inc., supra; Berlin v. Michigan Bell Telephone Co., supra; Drennan v. General Motors Corp., supra; Wilson v. Southwestern Bell Telephone Co., supra; Maez v. Mountain States Tel. and Tel., Inc., 54 F.3d 1488 (10th Cir. 1995). Most of the courts addressing the issue have determined that the duty to inform (or stated otherwise, the duty to refrain from affirmative material misrepresentations) arises when plans to change a pension benefit are under "serious consideration." Guidance is required from the United States Supreme Court to determine just exactly what constitutes "serious consideration" for purposes of invocation of this fiduciary duty.

Petitioners submit that the Second, Sixth and Eighth Circuits have appropriately left the determination of what constitutes "serious consideration" up to the trier of fact who unquestionably has the advantage of evaluating all of the evidence in context in order to determine when a change to a pension plan was under serious consideration. See Mullins v. Pfizer, Inc., supra; Berlin v. Michigan Bell Telephone Co., supra; Drennan v. General Motors Corp., supra; Wilson v. Southwestern Bell Telephone Co., supra. The Third Circuit in Fischer II, has essentially usurped the function of the trier of fact by defining "serious consideration" in such a restrictive manner that the duty to truthfully inform plan participants about a possible change to the pension plan can almost never arise until the end stage of an exhaustive planning process when senior management decides to recommend such a change to the person who has the ultimate authority to implement the amendment.

The predictable impact of the Third Circuit's far reaching decision is to enable companies to mislead plan participants into believing that no change to the pension plan is being contemplated when, at the same time, senior management has indeed delegated to middle management the responsibility to plan such a change. Under the Third Circuit's definition of "serious consideration," such action would not invoke the fiduciary duty to truthfully inform inquiring plan participants of this activity even if senior management knows that recommendation of such a plan change is inevitable given the particular circumstances with which the company is faced. Indeed, the instant case provides an excellent example of this scenario.

The extensive history of PECo's planning efforts submitted to the District Court for consideration, and set forth above, clearly established that: (1) PECo had too many employees as compared to the utility industry and had a goal of reducing its staff; (2) PECo knew that if it did not get its full rate increase request, it would have to reduce costs quickly; (3) the most efficient way to reduce costs quickly is through a reduction of the overbloated workforce; (4) one of the most efficient ways to reduce its workforce is through a retirement incentive (and in fact it was PECo's policy to use incentives as opposed to layoffs; and (5) by October 1989, when the PUC staff recommended that PECo receive less than half the rate increase requested and certainly by March 1, 1990, when the ALJ issued the interim decision recommending that PECo only receive 21% of its rate increase, PECo had to have known that it was not going to receive its full rate increase and that the need to reduce costs quickly through staff reduction via retirement incentives was imminent. It was against this substantial factual background that the District Court correctly determined that PECo was seriously considering an early retirement incentive by March 12, 1990, when Kenneth Lefkowitz contacted an outside actuary, TPF&C, and raised the possibility of an early retirement sweetener as a method to quickly reduce costs. Despite the fact that there was a specific event which made consideration of an early retirement incentive necessary and its eventual recommendation to the Board of Directors inevitable, and despite the fact that Mr. Lefkowitz, the very person in charge of developing the early retirement

incentive plan, contacted TPF&C in accordance with his duties as Manager of Compensation and Benefits, his request that TPF&C prepare proposals for an early retirement sweetener did not constitute "serious consideration" under the Third Circuit's three prong test because he was not senior management having the ultimate authority to recommend such a change to the Board of Directors. The Third Circuit has thus approved of PECo's action in telling plan participants that no changes to the pension plan were being contemplated at a time when PECo was indeed spending thousands of dollars to develop proposals for an early retirement incentive which was almost certainly going to be recommended to the Board of Directors for implementation. Left unchallenged, the Third Circuit's three-prong test sets a dangerous precedent which is detrimental to the protections afforded to plan participants under ERISA. For this reason, certiorari should be granted so that the Supreme Court can finally determine when the fiduciary duty to truthfully inform plan participants of future pension changes arises.

B. The Third Circuit's Decision Conflicts with the Duties of a Fiduciary under ERISA as Espoused by this Court.

In Varity Corp. v. Howe, supra, the United States Supreme Court recently reviewed the circumstances under which an employer who was also a plan administrator has fiduciary obligations to plan participants when communicating about plan benefits. The Court held that "conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power appropriate to carrying out an important plan purpose," and as such gives rise to the fiduciary obligations under ERISA. Varity Corp. v. Howe, supra, 116 S. Ct. at 1073. Once reaching that decision, the Court had no difficulty in deciding that in misleading beneficiaries, the employer violated the fiduciary obligations that ERISA §404 imposes upon plan administrators, noting as other courts have held that "lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in Section 404(a)(1) of ERISA. Id, 116 S. Ct. at 1074 [citations omitted].

This Court's decision in Varity v. Howe, supra, makes it abundantly clear that a plan fiduciary cannot affirmatively mislead plan participants about the likely future of plan benefits. Under the Third Circuit's three-prong test of serious consideration, however, a company can effectively engage in such conduct without violating ERISA fiduciary imposed duties. Consider this possibility. A company president advises the manager of corporate benefits that he needs to reduce costs quickly and asks the manager to develop proposals, including an early retirement incentive, to accomplish this goal. The manager then, on instruction from the president, seeks outside assistance in developing such plans for ultimate consideration by those with authority to recommend such a plan to the Board of Directors. Despite the fact that the mandate came from the president of the company himself who had a precise goal in mind, to reduce costs quickly, the company would still have the right under the Third Circuit's definition of serious consideration, to inform inquiring plan participants that there were no such plans being contemplated. It is submitted that even though permitted under the Third Circuit's definition of serious consideration, such a statement is misleading, and consequently, contrary to the policies established under ERISA for the protection of employee benefits as espoused by the United States Supreme Court in Varity v. Howe, supra.

C. The Third Circuit's Decision Conflicts with Decisions of other Courts of Appeals.

The Second, Sixth and Eight Circuits have all determined in cases very similar to the Fischer case that an ERISA plan administrator has a fiduciary duty to avoid making material misrepresentations to plan beneficiaries about any future benefit offerings. See, Mullins v. Pfizer, Inc., supra; Berlin v. Michigan Bell Telephone Co., supra; Drennan v. General Motors Corp., supra; Wilson v. Southwestern Bell Telephone Co., supra. In each of these cases, the Courts decided that a statement to employees to the effect that future incentive programs are not planned can be a material misrepresentation if such plans are under serious consideration. However, these courts, unlike the Third Circuit in Fischer II, have left the question of when serious

consideration begins up to the trier of fact who, after all, is in the best position to weigh and evaluate all of the evidence in the context in which it is presented. No restrictive three prong test or other definition of serious consideration is imposed upon the trier of fact by the other circuit courts of appeals who have reviewed this particular issue. To this extent, the novel, three prong test developed by the Third Circuit is in conflict with the decisions of the Second, Sixth and Eighth Circuits.

In reality, the Third Circuit's opinion in Fischer II is also in conflict with the Third Circuit's initial decision in this case. In Fischer I, the Court likewise concluded that the determination of whether "the content of the particular communications PECo allegedly made to members of the plaintiff class and whether such communications constituted affirmative misrepresentations are questions of fact properly left to the trier of fact on remand." Fischer I, supra, 994 F.2d at 135. [Appendix at A-67]. It is obvious that after the District Court fulfilled its obligation as the trier of fact to determine based when serious consideration began in this case, the new panel for the Third Circuit Court of Appeals hearing the case on the second appeal was unhappy with the outcome and therefore developed a restrictive definition of serious consideration which would assure that serious consideration can never be deemed to begin until all of the planning efforts for a change to pension benefits is virtually completed and recommendation to the person with ultimately authority to implement such changes is imminent.

Significantly, in the first appeal in the companion case of Kurz v. Philadelphia Electric Co., 994 F.2d 136 (3d Cir. 1993) (Appendix A-67 to A-76), the Third Circuit rejected the imposition of a bright line rule in determining when an affirmative misrepresentation is material recognizing that "any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." Id, 994 F.2d at 139, quoting Basic Inc. v. Levinson, 485 U.S. 224, 236, 108 S. Ct. 978, 986, 99 L. Ed.2d 194 (1988). Yet, the three prong test unequivocally establishes such a bright line rule in the sense that it does not permit the trier of fact to take

into consideration fact specific evidence which may lead to the conclusion that serious consideration began before the three prong test is satisfied.

In essence, under the Third Circuit's new definition, serious consideration is no longer a pure question of fact for resolution by the trier of fact as it is in the Second, Sixth and Eighth Circuits. This conflict should be resolved by the Supreme Court, particularly given the far-reaching implications of the Third Circuit Court of Appeals' decision.

CONCLUSION

The Petition for Writ of Certiorari should be granted as to carry out the Court's mandate that honesty should prevail in the administration of pension plans by employer fiduciaries.

Respectfully submitted:

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